

FAIR POLITICAL PRACTICES COMMISSION
Memorandum

To: Chairman Randolph, Commissioners Blair, Downey, Karlan, and Knox

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Subject: Pre-notice Discussion of Proposed Regulatory Action to Address General Plan Decisions: Amendment of Regs. 18704.2 and 18705.2, Adoption of Regs. 18706.1 and 18707.10, and Amendment of Reg. 18707.1.

Date: March 3, 2004

I. EXECUTIVE SUMMARY

This regulatory project was undertaken to address specific concerns raised by the County of San Diego regarding application of the “public generally” exception, Step 7 of the Commission’s conflict-of-interest analysis, in general plan decisions.¹ Because a general plan governs the direction of future land use in a city or county, members of the regulated community have proposed that special rules be developed for general plan decisions to increase participation by disqualified public officials. Following a series of interested persons’ meetings and consideration of the issues by the Commission, draft regulatory language was presented to the Commission at its June 2003 meeting. The Commission rejected a regulatory proposal presented by the County of San Diego, but directed staff to develop regulatory proposals at Step 4 (direct/indirect involvement), Step 5 (materiality standard), Step 6 (reasonable foreseeability), and Step 7 (“public generally” exception) of the conflict-of-interest analysis.

The Commission also asked the staff to examine the following:

- The development of regulatory language which can address an official’s business interests and sources of income, in addition to his or her real property interests;
- How to limit special rules for general plan decisions to the types of decisions which are wide in scope and made purely for policy or similar planning purposes;

¹ Some small jurisdictions also raised concerns regarding the “public generally” exception. The Commission considered but rejected proposed amendments to a specialized “public generally” exception (former regulation 18707.3) applicable only to small jurisdictions. At its January 2003 meeting, the Commission decided to repeal regulation 18707.3 and directed staff to examine the issues raised by the small jurisdictions as part of this project.

- Whether it is viable to develop a “proportional effects” rule for the “substantially the same manner” prong, including language for a cap on the financial effect experienced by the particular public official;
- Whether the development of a standard of care² for a public official which can be applied to any governmental decision is feasible; and
- Whether disclosure of a conflict of interest is sufficient to overcome disqualification.

At its September 2003 meeting, the Commission adopted regulation 18709, codifying the Commission’s segmentation process, to address some of the issues. (See regulation 18709.)³ The Commission is now asked whether any special provisions for general plan decisions should be considered for adoption in May 2004. If so, the Commission is asked at which steps the regulatory amendments are to be made. Based on discussion among staff and interested persons’ input,⁴ staff presents several regulatory options dealing with Steps 4 – 7, as requested by the Commission. This memorandum summarizes the proposals and arguments for and against each. Recommendations are made, as appropriate, for pre-notice discussion. The following regulatory actions can be adopted individually or in combination with one another:

1) *Steps 4 and 5 - Indirect Involvement/Material Financial Effect:*

Amend regulation 18704.2 to specify that the involvement of real property in certain broad, policy-making general plan decisions is deemed **indirect** and/or amend regulation 18705.2 to establish a stronger presumption that the effect on real property indirectly involved in these types of decisions is **not material**. (Attachment 1.)

2) *Step 6 - Foreseeability:* Add a new regulation 18706.1 to codify criteria which describes when it is **not reasonably foreseeable** that a general plan decision will have a material financial effect on a public official’s economic interests, including business interests, sources of income and real property. (Attachment 2.)

3) *Step 7 – “Public Generally” Exception:* Adopt a special “public generally” exception which is applicable to certain (broad/policy) general

² The standard of care issues will be addressed at a future time. An interested persons’ meeting on this topic will be held in March 2004.

³ All citations herein are to the Government Code sections 81000 – 91014 unless otherwise noted. All regulatory citations are to Commission regulations at Title 2, sections 18109 – 18997, of the California Code of Regulations.

⁴ To solicit broad public input on this project, Commission staff has held a number of interested persons’ meetings in both Sacramento and San Diego. These meetings took place on July 12, 2002 (Sacramento), September 19, 2002 (San Diego), February 6, 2003 (Sacramento), and January 13, 2004 (Sacramento). Attendees included representatives from offices of the San Diego County Counsel, San Diego City Attorney, Ventura County Counsel, Napa County Counsel, Town of Windsor, Monterey County Counsel, San Rafael City Attorney, Mountain View City Attorney, Chula Vista City Attorney, the California Association of Realtors, California Public Utilities Commission, the Governor’s Office for Planning and Research, and the law firms Reed and Davidson, Meyers Nave, and Pillsbury Winthrop.

plan decisions where the economic interest causing the conflict of interest is real property. Options presented include a “proportional” effects rule with “cap language” and a “safe harbor” option which lists objective criteria. (Attachment 3.)

Examples of how these amendments or new regulations would work, as compared to the Commission’s current rules, are also presented in this memorandum. (Attachment 6.) Summarized below is a list of decision points and corresponding recommendations of the staff⁵:

Decisions 1 – 4: If the Commission wishes to take regulatory action to address the general plan issues, the Legal Division recommends adoption of proposed regulation 18706.1 (the foreseeability regulation). Amendment of regulation 18704.2 (the direct/indirect involvement regulation) is the second recommended option of the Legal Division and the first choice of the Enforcement Division. Staff does not recommend amendment of regulation 18705.2 (the materiality regulation) or adoption of proposed regulation 18707.10 (a “public generally” exception regulation). This is explained further in this memorandum.

Decisions 5 - 7e need to be made only if the Commission decides to adopt regulation 18707.10, relating to the “public generally” exception. If the Commission decides to move forward regarding regulation 18707.10, the Legal Division recommends the following:

Decision 5: Include language so that regulation 18707.10 governs decisions to adopt or amend a land use element.

Decision 6: Do not include a mandatory factors test without also providing guidance as to the specific information that can be used.

Decision 7: Staff recommends Option 2, a factors approach which considers the effect of a decision relative to property size, location, uses and zoning.

Decision 7a: Staff does not recommend comparison of the official’s property with the average size of property of the “significant segment.”

Decision 7a1: Allow an official the option of assessing the “substantially the same manner” prong by considering characteristics of his or her district as opposed to only the jurisdiction at large.

Decisions 7b – 7c: Base the factor pertaining to the relative location of the official’s property on the criterion previously used by the Commission in the “public generally” exception applicable to small jurisdictions.

Decision 7d: Provide relative location criteria for areas of differing population densities and distributions (e.g. a rural area).

Decision 7e: See Decision 7a1, above.

As part of its review of the “public generally” exception, staff also has identified clarifying amendments that can be made to existing regulation 18707.1 (Attachment 4).

⁵ Discussion of each decision point and recommendation is included in the last section of this memorandum.

If the Commission decides to make these clarifying amendments, the amendments can be made independently of any regulatory action meant to address the general plan issues. Decision 8 pertains to these amendments.

Decision 8: Staff recommends Version 1 language to clarify regulation 18707.1.

II. BACKGROUND

A. General Plan

As discussed in staff's memorandum to the Commission entitled, "*Overview of Public Generally Regulations as Applied to General Plan Decisions*," May 23, 2003, California law requires each city and county to adopt a general plan "for the physical development of the county or city, and any land outside its boundaries which ... bears relation to its planning." (Government Code section 65300.)⁶

A general plan has several mandatory elements which consist of the following: land use, circulation, housing, conservation, open space, noise, and safety. (Government Code section 65302.) All of these elements must be consistent with one another. Furthermore, all developmental decisions must be consistent with the general plan. The land use element is perhaps the broadest in scope and is often perceived as being the most representative of the general plan. General plans may be amended by private or public initiative. Some general plan amendments facially apply to the entire jurisdiction, but in practice affect only a discrete property or area in the jurisdiction.⁷

B. Eight Step Conflict-of-Interest Analysis

The Act prohibits a public official from making, participating in making or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest. (Sections 87100, et seq.)⁸ A conflict of interest is

based on the following questions:

1. Is the individual a "public official"?
2. Will the public official be making, participating in making, or influencing a governmental decision?
3. What are the public official's economic interests?

⁶ See the staff memo for a more detailed discussion of general plan laws and Commission staff advice.

⁷ For example, a proposed circulation element may be applicable to an entire jurisdiction but the element proposes to construct a traffic median on a particular road within the city, or a general plan amendment can decrease the number of housing units that could be added to identifiable neighborhoods.

⁸ Staff did not consider drafting regulatory language to require disclosure of a conflict of interest, in lieu of disqualification. A statutory amendment to sections 87100 and 87103 would be required.

4. Will one or more of those economic interests be directly or indirectly involved in the governmental decision?

5. Based on the applicable materiality standard, is the financial effect of the governmental decision on those economic interests “material”?

6. Is the material financial effect of the governmental decision on the public official’s economic interests reasonably foreseeable?

If the answers to all of the above are yes, then the public official will have a conflict of interest with respect to the governmental decision of his or her agency unless the following two questions can be answered in the affirmative:

7. Does the “public generally” exception apply?

8. Is the public official legally required to participate in the governmental decision?

1. Current Rules and Advice Relating to General Plan Decisions

Requests for written advice relating to general plan decisions typically concern an official’s economic interest in real property or a business entity. The following discussion briefly summarizes Commission rules and advice regarding these economic interests.

a. Steps 4 & 5 - Indirect Involvement/Materiality Standard

The potential for a conflict of interest first becomes apparent in Steps 4 and 5 of the eight-step process when the applicable materiality standard is identified.

Real Property: The most common economic interest prompting requests for advice regarding general plan decisions is a public official’s economic interest in his or her principal residence. (See staff memorandum, “*Overview*,” *supra*.) At Step 4, an official must determine if his or her interest in real property is directly or indirectly involved in a general plan decision. This determination is necessary in identifying the appropriate materiality standard applicable to real property (Step 5) and usually has a significant impact on an official’s obligation to disqualify from a decision. If real property is directly involved in a decision, the financial effect of the decision is presumed to be material.⁹ (Regulation 18705.2(a)(1).)

⁹ An interest in real property includes leaseholds. There are separate sets of factors applicable to leaseholds which may rebut the presumptions with respect to materiality. These factors include an effect on: the termination date of the lease; the amount of rent paid by the lessee; the value of the lessee’s right to sublease the real property; the legally allowable use or the current use of the real property by the lessee; the use or enjoyment of the leased real property by the lessee.

Alternatively, if such property is indirectly involved in a decision, then the financial effect of the decision is presumed *not* to be material. (Regulation 18705.2.) Notwithstanding this presumption, there still may be proof that the official has a conflict of interest due to the nature of the general plan or land use element decision. (See regulation 18705.2(b)(1).)

In general, Commission advice as to whether real property is directly or indirectly involved in a general plan decision varies based on the details of the decision. (See staff memorandum, “*Overview*,” *supra*.)

Business Entities: As to business entities, unless a business entity is the applicant for a general plan amendment, the business entity is considered to be indirectly involved in the decision.

b. Step 6 - Reasonable Foreseeability

Step 6 of the eight-step analysis involves an evaluation of whether there is a “reasonably foreseeable” material financial effect on a public official’s economic interests. If the material financial effect is not reasonably foreseeable, no conflict of interest exists.

Real Property: A review of staff advice indicated that in most situations it is reasonably foreseeable that a material financial effect will result from land use (e.g., development) decisions. (See staff memorandum, “*Overview*,” *supra*.)

Business Entities: Commission staff has advised that because there are many variables to identify and analyze in order to determine whether it is reasonably foreseeable that certain decisions will materially affect an official’s economic interest in a business entity (or source of income), those determinations must be made on a case-by-case basis. (See staff memorandum, “*Overview*,” *supra*.)

c. “Public Generally” Exception (Step 7)

The Act provides that a public official may participate in a governmental decision despite the existence of a disqualifying conflict of interest if the financial effect of that decision on the official’s economic interests will not be *distinguishable from the decision’s effect upon the public generally*. (Section 87103; regulation 18700(a).) This qualifier is the genesis of the “public generally” exception.

The primary form of the public generally exception is embodied in regulation 18707.1 (the general rule). Currently, there are also six specialized forms of the public generally exception. (Regulations 18707.2-18707.9.)¹⁰ The exception has two components: (1) all, or a *significant segment*, of the public within the agency’s

¹⁰ Staff initially considered possible amendments to regulation 18707.9, which was drafted to deal with landlord/tenant issues. It was determined that it would be more feasible to draft a stand-alone regulation, as requested by the Commission.

jurisdiction will be affected by the decision, and (2) the effect upon the public official's economic interest will be in *substantially the same manner* as the effect upon the significant segment. (Regulation 18707(b).)

While the Commission has quantified the term "significant segment," the same is not true for the term "substantially the same manner." For a variety of reasons including the difficulty in developing a "bright line rule" for what it means to be affected in "substantially the same manner," the Commission has consistently determined since 1975 that the term "substantially the same manner" should be applied on a case-by-case basis. (See staff memorandum, "*Overview*," *supra*.) While advice regarding the application of this exception is dependent on the facts presented in a particular situation, public officials have been consistently advised that:

- Owners of multiple properties of the same description (typically zoning category) are financially affected in a manner that is not substantially the same manner as the effect upon members of the significant segment who own only one property of that description (the "magnitude of effects" analysis); and
- A financial effect that is substantially the same in manner is generally not present when the distance: 1) between a public official's real property and the real property within the general plan decision area is not comparable to; 2) the distance between the latter and the real property owned by those comprising the significant segment.
(See staff memorandum, "*Overview*," *supra*.)

III. DISCUSSION OF PROPOSED REGULATORY ACTION

A. General Purposes of Proposed Language - All Proposals

Jurisdictions concerned with the application of the Commission's rules to general plan decisions are specifically interested in special rules that apply to fundamental, jurisdiction-wide land use decisions. According to these jurisdictions, it is these types of decisions in which public officials should be allowed more participation. Therefore, proposed language for each of the identified steps of the conflict-of-interest analysis (steps 4 -7) attempts to strike an appropriate balance between disqualification and participation under such circumstances.

For this reason, the language presented in all proposed regulatory actions applies to decisions which identify "planning objectives" or "are otherwise exclusively one of policy." The purpose of this language is to sift out general plan decisions which are being made in order to enable developers, businesses or other interests to generally execute their economic agenda within the community. As such, the eligibility criteria for each step are designed to capture general plan decisions which are generic or advisory, while excluding general plan decisions which are executory.

Also, the proposed language is intended to be objective, easy to understand, and easy to apply. It is understood that because all options require that a decision only define planning objectives or is otherwise exclusively one of policy, drawing the line between a decision which is exclusively one of policy and one that is not may be challenging to public officials at times. However, participants at the January 2004 Interested Persons' meeting agreed that this is an appropriate criterion. Additionally, in the sense that regulatory language defines various types of activities or decisions which can be objectively identified (e.g., a permit, license, zoning designation, zoning variance, adoption or change to a land use ordinance or specific plan decision), specificity is provided. The usage of generalizations is unavoidable to a certain extent since it is not possible to define specifically by name or title every possible decision which may or may not qualify for coverage under this rule.

Finally, proposed criteria for general plan decisions were developed and described by terms rooted in land use and development law, cross-referencing specific sections of Title 7 of the Government Code (Planning and Zoning). These terms (equally suitable to Steps 4, 5, 6, and 7) are used in proposed language for regulations 18704.2, 18705.2, 18706.1, and 18707.10.

The following is an explanation of the specific proposals. Examples of their application are illustrated in Attachment 6.

B. Steps 4 & 5: Amendment of Regulations 18704.2 and/or 18705.2

Because a conflict of interest in a general plan decision most commonly arises from an economic interest in real property, the proposed amendments to regulations 18704.2 and 18705.2 specify whether real property in certain types of general plan decisions is directly or indirectly involved and provide guidance with regard to what types of specific circumstances can rebut a presumption of non-materiality.

Conflicts of interest do not similarly arise from an official's economic interest in a business entity or individual since these types of economic interests are generally indirectly involved in a general plan decision. Where a business entity or individual is directly involved in a decision, it is because the entity or individual initiated the proceeding in which the decision will be made or is the subject of the decision. These special rules for general plan decisions are not meant to apply to these circumstances. Rather, these economic interests would be governed by proposed regulation 18706.1, as discussed below.

The proposed amendments for 18704.2 and 18705.2, below, can be made to either regulation, respectively, or to both regulations.

1. Regulation 18704.2 {Decision 1}

The proposed amendment to regulation 18704.2(b) (Attachment 1) specifies that real property in which a public official has an economic interest will be *indirectly*

involved in a certain type of general plan decision. Specifically, proposed **subdivision (b)(3)** would provide that real property is indirectly involved if:

“The decision is whether to adopt or amend a general plan, but only identifies planning objectives or is otherwise exclusively one of policy and does not concern an identifiable parcel or development project, or the agency’s prior, concurrent or subsequent approval of, or change to, a permit, license, zoning designation, zoning variance, land use ordinance, or specific plan (or its equivalent).”

The proposed language also contains a provision describing when a general plan decision does not “concern an identifiable parcel” due to the presence of maps or diagrams.¹¹ These criteria are repeated in the proposed language for each step of the conflict-of-interest analysis.

This amendment would result in real property being considered indirectly involved in certain general plan decisions. This approach is beneficial because it is consistent with other direct/indirect involvement rules. Currently, under regulation 18704.2(b), there are other decisions which are already considered indirectly involved, simply by virtue of the type of decisions they are (e.g., amendments to existing zoning ordinances or other land use regulation, and repairs, replacements, or maintenance of streets, etc.). The types of decisions governed by the indirect involvement standard are decisions where it would not be clear which type of involvement applies, but for the current rules of subdivision (b). Similarly, at times, it has been unclear as to whether real property was directly or indirectly involved in a general plan decision since these determinations are fact-dependent. (See staff memorandum, “*Overview*,” *supra*.)

This amendment would clearly offer some relief to public officials in determining the type of involvement of the real property, and, in turn, the applicable materiality standard (or presumption). On the other hand, this relief would be limited to the extent that a presumption is not conclusive, as discussed below. Choosing this option would eliminate a need to deviate from the current structure of the Commission’s regulations. In addition, this amendment can stand alone or be made in conjunction with the proposed amendment to regulation 18705.2.

The staff supports a solution that includes addressing the general plan issues at Step 4. There was also some support for this approach among interested persons. However, the San Diego County Counsel is concerned this proposed language may not go far enough to allow participation by public officials in these general plan decisions and will not capture many decisions which create problems for public officials.

¹¹ At the February 2004 Interested Persons’ Meeting, several participants raised concerns that most general plan decisions involve land use maps or other diagrams depicting “identifiable parcels” in the jurisdiction and so might not be governed by this exception, diminishing the usefulness of this amendment. As such, this language was added.

2. Regulation 18705.2 {Decision 2}

When real property is indirectly involved in a decision, the financial effect of a governmental decision on the real property is *presumed not to be material*. This presumption may be rebutted by proof that there are specific circumstances which make it reasonably foreseeable that the decision will have a material financial effect on the real property. Current language offers a non-exclusive list of examples where such circumstances arise:

“(A) The development potential or income producing potential of the real property in which the official has an economic interest;

(B) The use of the real property in which the official has an economic interest;

(C) The character of the neighborhood including, but not limited to, substantial effects on: traffic, view, privacy, intensity of use, noise levels, air emissions, or similar traits of the neighborhood.” (Regulation 18705.2(b)(1).)

Several interested persons have commented that circumstances resulting from many general plan decisions will frequently rebut this presumption since they are often meant to alter existing land use. As a result, public officials will err on the side of caution and abstain from participating in a decision although the financial effect of the decision is presumed to not be material.

To allay these concerns on the part of public official, the proposed amendment is meant to strengthen the presumption of non-materiality with regard to the types of policy decisions described earlier. **{Decision 2}** This amendment adds **subdivision (b)(1)(B)** (Attachment 1) which specifies that where the decision affects only the character of the neighborhood the presumption would not be rebutted unless other effects will also result from the decision. This provision is added because it seems as though the effects on the character of a neighborhood are most difficult to assess.

However, the comment has been made that it may be equally difficult to assess changes relating to the development potential or incoming producing potential of the official’s property so that distinguishing between effects on a neighborhood and other types of effects may be arbitrary. Additionally, the list of “specific circumstances” as currently written is a non-exclusive list. There may be a number of other specific circumstances surrounding a particular decision which could rebut a presumption of non-materiality.

Essentially, the potential for other unidentified factors to rebut this presumption is what causes uneasiness for officials but which offers a safeguard against clear conflicts of interests arising from circumstances which would otherwise not be specified. In determining whether to address the general plan issues at this step, the Commission

should consider whether the possible “uncertainty” of the existing presumptions causes enough concern to alter these presumptions specifically for general plan decisions.

Finally, the presumption of non-materiality (or, for that matter, materiality) is closely linked to whether or not it is reasonably foreseeable that a “material financial effect” will result from the decision. Consequently, it may be more desirable to address these concerns regarding the effect of a general plan decision in Step 6.

C. Step 6: Adoption of Regulation 18706.1 {Decision 3}

Proposed regulation 18706.1 sets forth a special rule under which if a governmental decision to adopt or amend a general plan meets the narrow criteria specified in the regulation, it is deemed NOT reasonably foreseeable that the decision will have a material financial effect upon a public official’s economic interests. This proposed regulation would apply to any type of an economic interest that a public official may have. **Subdivision (a)** states this rule, **subdivision (b)** specifies the criteria, and **subdivision (c)** provides definitions.

Decisions adopting or amending a general plan that meet the criteria of this regulation are those which:

- Only identify planning objectives or are otherwise exclusively policy decisions;
- Are preliminary in nature, in that further decisions by the official’s agency are necessary prior to the undertaking of a particular activity. (Examples in the regulation of a “further decision” include permitting, licensing, rezoning, a zoning variance, and adoption or change to a land use ordinance, specific plan, or their equivalent);
- Do not concern the agency’s prior, concurrent or subsequent approval of, or change to, any of the examples provided immediately above;
- Do not concern an identifiable parcel or development project;
- Do not include a matter initiated by a public official in his or her private capacity or, if initiated in an official capacity, were not initiated for the purpose of affecting an economic interest of the official; and
- Do not include a matter initiated by a person which is an economic interest of the public official, or was initiated on behalf of the public official or any person which is an economic interest of the public official.

Subdivision (c) defines “specific plan or its equivalent”, “general plan” and what is meant by a governmental decision to “adopt or amend a general plan”.

Regulation 18706.1 proposes to resolve public concerns regarding unnecessary disqualification of public officials from general plan decisions by concluding, if the factors apply to specific facts, that it is not reasonably foreseeable that certain types of general plan decisions will have a material financial effect upon officials' economic interests. This regulation allows officials to avoid the problems which, it is claimed, result in unnecessary disqualification from participating in these decisions. That is, officials bypass the problem of their inability to acquire the information (due to expense, a lack of time, or unavailability of data) necessary to either rebut a presumption of regulation 18705.2 which led to their disqualification or to qualify for the public generally exception. Overall, the criteria presented in the proposed regulation offer more specificity in terms of defining when a reasonably foreseeable material financial effect on an economic interest is not present, than what is available under the current "foreseeability" regulation (regulation 18706).¹²

Narrowly drafted to address general plan decisions only, the proposed regulation leaves undisturbed prior Commission opinions and advice laying out the analytical approach by which a public official may determine whether it is reasonably foreseeable that governmental decisions, other than general plan decisions described in this proposed regulation, will have a material financial effect on his or her economic interest.

However, the Enforcement Division is concerned that utilizing this concept is the first step on a "slippery slope." Once it is concluded that it is not reasonably foreseeable that a particular type of decision will have a material financial effect on public officials' economic interests, at future times other types of decisions might similarly enjoy this conclusion, making it more difficult to maintain an enforcement action when a public official knows or has reason to know that a particular governmental decision will have a material financial effect on his or her economic interests.

While participants at the Interested Persons' meeting generally concluded that the proposed regulation would be helpful, some individuals stated that the eligibility criteria in subdivision 18706.1(b) might narrow its applicability to the point that it would not capture a significant enough number of general plan decisions to resolve the current problem.¹³

¹² Current regulation 18706 lists factors which "should be considered" but specifically states that "these factors are not intended to be an exclusive list of the relevant facts that may be considered in determining whether a financial effect is reasonably foreseeable." In contrast, proposed regulation 18706.1 would provide an exclusive list of factors which must be considered. Once met, this proposed regulation would conclusively determine that a material financial effect is not reasonably foreseeable.

¹³ Some individuals at the January 2003 Interested Persons' meeting urged the Commission to reconsider adopting time parameters so as to limit the prospective period during which a material financial effect on an economic interest must be found, in order for that effect to be reasonably foreseeable. Time parameters have been considered but rejected by the Commission and are not further discussed.

D. Step 7: Adoption of Regulation 18707.10 {Decision 4}

Since conflicts of interest in general plan decisions most frequently arise from the official's principal residence, proposed regulation 18707.10 is a specialized "public generally" regulation applicable where a decision before the public official is a certain type of general plan decision and where the conflict of interest arises from the official's real property.¹⁴ Since the regulation contemplates applying a "one-size fits all" approach to general plan decisions, it is necessarily detailed as discussed below.

Subdivision (a), (b)(1) and (b)(2). This regulation would apply only where the decision is to adopt or amend one of the listed mandatory elements of a general plan, or where the decision is to adopt or amend a general plan provided the decision:

- only identifies planning objectives or is otherwise exclusively one of policy;
- does not concern an identifiable parcel or development project; and
- does not concern the agency's prior, concurrent or subsequent approval of, or change to, certain land use actions.

As with the other proposed regulations, the proposed regulation 18707.10 contains a provision describing when a general plan decision does not "concern an identifiable parcel" due to the presence of maps or diagrams. (**Subdivision (b)(2).**)

Subdivision (c). In addition, the decision must apply to all persons with real property in the jurisdiction or district of the public official.

{Decision 5} Assuming the Commission desires adoption of a new regulation, the Commission is asked to consider whether this regulation should govern decisions to adopt or amend a land use element. (**Subdivision (b)(1).**)

The Decision 4 option allows the Commission to significantly narrow the regulation by making it inapplicable to land use element decisions. However, both interested persons and staff believe that omitting land use element decisions would greatly diminish the usefulness of this regulation given the importance of the land use element.

1. Significant Segment

The proposed language of **subdivision (d)** does not alter the current significant segment rules applicable to real property. Regulation 18707(b)(1)(B) would apply for purposes of regulation 18707.10.

¹⁴ At its June 2003 meeting, the Commission determined that staff should focus on developing a separate regulation focusing on general plan decisions rather than amend regulation 18707.1 due to the nature of general plan decisions and the difficulty in tailoring appropriate factors for this exception.

2. Substantially the Same Manner

{Decision 6} With regard to assessing this prong of the “public generally” exception, this decision asks whether proposed language stating that consideration shall be given to certain factors should be adopted. The factors would include changes to property boundaries, zoning designations, current or potential use, development or income potential, size, current or projected value of the real property and the characteristics of the neighborhood impacting the traffic, view, privacy, intensity of use, noise level and air emission as a result of the decision. (**Subdivision (e).**)

Because the proposed regulation attempts to define “substantially the same manner,” it may provide the guidance that several jurisdictions point out is missing in the current regulations. The Decision 5 language states that certain factors “shall be considered.” This provision does not specify what types of information should be used. As a result, this particular approach would seem to offer the “worst of both worlds:” it provides a “grocery list” of factors that may inadvertently leave out an important one, and it imposes a high standard with no guidance as to how the standard may be met. Staff does not recommend this language.

{Decision 7} Two options for definition of “substantially the same manner” are also presented for the Commission’s consideration:

Option 1 (Proportional Basis with Optional Cap) {Decision 7}: Option 1 states that two requirements be met in order for the “substantially the same manner” prong to be met. First, real property of the significant segment must be located within 500 feet of the official’s property under the language of **subdivision (e)(1)(A).**¹⁵

Second, **subdivision (e)(1)(B)** provides that the decision must be implemented proportionally on the basis of size. Because a proportional rule could result in significantly disparate financial effects from one property to the next, optional language to cap a resulting difference in effect is provided with two alternatives. One alternative attempts to cap a financial effect by comparing the size of the official’s real property with the average (e.g., the mean, mode, or median) size of real property of the significant segment **{Decision 7a}**. The other alternative uses the minimum parcel size in the official’s jurisdiction as a measure based on a percentage variance **{Decision 7a1}**. Subdecision point 7a1 offers optional language for using the minimum parcel size of the official’s “district.”

Option 1 presents the concept of allowing proportional effects based on size. Staff rejects this approach if no cap is specified, or if there is no criterion requiring that

¹⁵ During Phase 2, the Commission determined that distance from the official’s property to the subject property alone is not conclusive of substantially similar effects since this was frequently a hard standard to meet. Commission staff has since advised that multiple factors can create financial effects upon an official’s economic interest. The proposed provision regarding location of the significant segment is offered for discussion purposes regarding whether further research into appropriate densities should be conducted by staff. (See discussion on Option 2.)

real property of the significant segment be located within 500 feet of the official's property.¹⁶ Without these requirements, the financial effect on an official could be vastly disproportionate to the financial effects experienced by the significant segment. Allowing disproportionate financial effects in these types of decisions would reverse the Commission's longstanding interpretation of "substantially the same manner." In particular, the Commission has repeatedly determined that if the financial effects on a public official vary greatly from the financial effects on members of the significant segment, then the effects of the decisions are distinguishable from the decision's effect on the public generally. (See staff memorandum, "*Overview*," *supra*.)

If a proportionality rule were to be adopted, there must be a cap on the financial effect experienced by the official. Nevertheless, the difficulty with imposing a cap is that it requires some kind of quantification and would not alleviate (and it may aggravate) the concerns presented by the County of San Diego regarding data-gathering.

Option 2 (Safe Harbor) {Decision 7}: Option 2 provides objective criteria for establishing whether the decision will affect the official's real property in substantially the same manner as it will affect the significant segment. (**Subdivision (e)(1).**)

Subdivision (e)(1)(A) requires that a certain number of properties **{Decision 7b}** within a specified distance **{Decision 7c}** from the official's property be under separate ownership. The subdivision also provides an alternate standard for rural areas **{Decision 7d}**. In areas where the housing density¹⁷ is 100 housing units/sq. mile or less, at least 5,000 properties must be under separate ownership, regardless of the distance from the official's property.¹⁸ Attachment 5 provides a comparison of housing densities of several jurisdictions within California.

Subdivision (e)(1)(B) requires that any modification to existing zoning designations must be the same for the official's property as for the property of the significant segment.

Subdivision (e)(1)(C) requires that the current or potential uses of real property of the official and of the significant segment be modified in the same manner by the decision.

Subdivision (e)(1)(D) requires that the size of the official's real property and the minimum parcel size of the official's jurisdiction does not vary by more than a specified percentage. **{Decision 7e}** As with subdivision (e)(1)(B), Decision 6e adds optional language for using the minimum parcel size of the official's "district." **{Decision 7f}** Decision 6f has bracketed language to determine the variance measured as a percentage.

¹⁶ Historically, proportionality has only been used in the "public generally" exception context with regard to decisions of certain special districts involving assessments, taxes, fees, charges, or rates. (Regulation 18707.2.)

¹⁷ In order to determine a jurisdiction's density, the total number of housing units is divided by the total area of the jurisdiction.

¹⁸ Quantifiable standards of population density must be provided in the general plan for each land use category contained in the plan.

Option 2 appears to be more desirable than Option 1 since it aims to maintain the traditional “substantially the same” manner approach but by using easier-to-apply criteria. These criteria include objective factors meant to ensure that the official is in fact being financially affected in substantially the same manner as the significant segment. Required assessment of housing density, property ownership, parcel size, and the effect on zoning designations and uses of real property is consistent with current regulations and past Commission opinions and advice.

Nevertheless, it may be that the difficulty in developing a “one size fits all” rule for “substantially the same manner” as used in the general rule (regulation 18707.1) may also extend to a specialized rule for general plan decisions. Since the existing “public generally” regulations all require some sort of statistical assessment, the expectation that this exception be based on empirical analysis has been created. The question posed by Option 2 is: how detailed should the factors be? At one end of the spectrum, it is possible to conceive of a regulation which has an index of jurisdiction densities and corresponding population distributions. At the other end, there would be the elimination of all numerical factors so that a public official would have to articulate, in whatever way he or she chose, how the official’s economic interest will be financially affected in a manner indistinguishable from that on the public generally, akin to the current “reasonable foreseeability” standard. Both would significantly change the current approach which falls somewhere in the middle.

Subdivision (f) further defines what types of decisions are governed by this regulation.

As with the other special “public generally” exceptions, the public official has the discretion as to whether he or she wishes to apply regulation 18707.1 rather than regulation 18707.10.

Pros/Cons – Overall Regulation

Addressing concerns raised by the County of San Diego at Step 7 seems appropriate since the type of general plan decisions contemplated by the proposed language are those which would broadly apply to members of the significant segment. Underlying this approach is the principle that it does not matter that the official’s real property will experience a material financial effect since a large enough number of other persons will experience a similar type of effect as a result of the decision. Additionally, proposed regulation 18707.10 is consistent with past Commission practice of developing special “public generally” rules for particular types of decisions which occur regularly.

However, adopting a special “public generally” rule for general plan decisions can also be viewed as another step in a steady progression to devise alternative requirements of the general rule. (See regulations 18707.2 – 18707.9.) Because exceptions to the Act’s rules are to be interpreted narrowly to uphold its purposes and objectives, adopting

yet another special rule under this step may broaden the exception rather than keep it narrow, and, consequently, may not be desirable.

Another problem with dealing with the general plan issues by adopting regulation 18707.10 is that a public official may have expended limited resources in assessing the prior steps of the conflict-of-interest analysis. Delaying an analysis which would apply specifically to general plan decisions may not be as helpful as if the analysis were incorporated at an earlier step. On the other hand, if the general plan issues are addressed at Step 7 as proposed, it will be clear that a public official may participate in a decision despite a resulting material financial effect. As with the other proposed rules, regulation 18707.10 is drafted narrowly to apply only to the broad, policy-making type of general plan decisions.

Options 1 and 2 offer public officials a way to be sure that this exception applies because these options provide objective criteria for the substantially the same manner prong. Staff prefers Option 2. While providing a “safe harbor” to officials, either option could inappropriately allow participation depending on the facts of a particular decision. At Step 7, there would be no subsequent guard against improper participation. Once an official qualified for the “public generally” exception, at this point, he or she would essentially have a “free pass.”

E. Step 7: Clarifying Amendments to Regulation 18707.1 {Decision 8}

In examining regulation 18707.1, the general “public generally” exception, staff has identified possible amendments to clarify this regulation’s application. (Attachment 4.) Version 1 offers minor clarifying amendments but also specifies that the financial effect on a public official’s real property need not be identical to the financial effect on the significant segment to be considered financially affected in “substantially the same manner.”¹⁹

In comparison, Version 2 of the proposed amendments additionally addresses how the “significant segment” can be determined when the public official has a leasehold interest. Under section 82033 and regulation 18233, an “interest in real property” includes a leasehold interest which is more than month-to-month. Therefore, the effect of section 82033 and current regulation 18707.1 is to create analyses for real property interests which are not parallel. Currently, a conflict of interest may arise for an official because the official has a lease. However, when applying regulation 18707.1, he must identify property owners to determine the “significant segment” rather than other persons who also have leasehold interests.

Version 2 provides an alternative rule for determining the significant segment where the public official has a leasehold interest. This version would define a significant

¹⁹ Not included herein is proposed language addressing ownership of parcels by a property owner. Presented at the January 2004 Interested Persons’ meeting, the provisions appear to be unnecessary based on subsequent discussion among staff. In particular, it seems clear that a public official must “count” property owners rather than parcels in determining the “significant segment.”

segment for an official's economic interest in a lease as ten percent or more of all persons having a leasehold interest in the official's jurisdiction or district, or, in the alternative, 5,000 persons having leasehold interests in the official's jurisdiction. Because information relating to property owners is more readily available, amending the regulation in this manner might make this exception more difficult to apply by public officials with leasehold interests. However, where a public official has such information at hand, it seems unfair to preclude the official from comparing financial effects on him or her with the effects on other leaseholders. Therefore, at the Commission's request, staff could draft language which would make a comparison with other leaseholders permissible rather than mandatory. For these reasons, staff supports language presented in Version 1 and seeks guidance as to whether the leasehold language of Version 2 is desirable.

IV. SUMMARY OF DECISIONS AND RECOMMENDATIONS

General Plans

The Commission could first determine it is not desirable to amend existing regulations or adopt a specific regulation concerning general plans. Assuming some regulatory action is desired, the Commission should consider that it is possible to select an approach which deals with one or all of the steps described since the proposed language has been drafted to maintain consistency among the various described steps.

Step 4 – Amendment to Regulation 18704.2

{Decision 1} This amendment would result in real property being considered indirectly involved in certain general plan decisions. This approach is beneficial because it is consistent with other direct/indirect involvement rules. At times, it has been unclear as to whether real property was directly or indirectly involved in a general plan decision since these determinations are fact-dependent. This amendment would result in certain decisions being clearly considered “indirectly” involved. The staff supports the inclusion of this language. There was also some support for this approach among interested persons. However, San Diego County Counsel is concerned this proposed language may not go far enough to allow participation by public officials in these general plan decisions.

Step 5 – Amendments to Regulation 18705.2

Proposed amendments to regulation 18705.2 are meant to strengthen the presumption of non-materiality with regard to the types of policy decisions discussed above which would be considered indirectly involved in a decision.

{Decision 2} This amendment adds subdivision (b)(1)(B), which specifies that where the decision affects only the character of the neighborhood, that specific circumstance will not be used to rebut the presumption of non-materiality.

Step 6 – Add Regulation 18706.1 – Foreseeability

{**Decision 3**} Proposed regulation 18706.1 sets forth a special rule when a governmental decision to adopt or amend a general plan meets the narrow criteria specified in the regulation, it is deemed NOT reasonably foreseeable that the decision will have a material financial effect upon a public official's economic interests. This proposed regulation would apply to any type of an economic interest that a public official may have. The Enforcement Division is concerned that utilizing this concept is the first step on a "slippery slope." While participants at the interested persons' meeting generally concluded that the proposed regulation would be helpful, some individuals stated that the eligibility criteria in subdivision 18706.1(b) might narrow its applicability to the point that it would not capture a significant enough number of general plan decisions to resolve the current problem.

Step 7 – Adopt Regulation 18707.10 - Specialized General Plan Regulation

{**Decision 4**} Proposed regulation 18707.10 is a specialized "public generally" regulation applicable to certain general plan decisions where the conflict of interest arises from the official's real property. The concept is supported generally by members of the regulated community. Adopting a special "public generally" rule for general plan decisions can also be viewed as another step in a steady progression to devise alternative requirements of the general rule. Because exceptions to the Act's rules are to be interpreted narrowly to uphold its purposes and objectives, adopting yet another special rule under this step may broaden the exception rather than keep it narrow, and, consequently, may not be desirable.

Staff Recommendations on Decisions 1 - 4: If the Commission decides that regulatory action should be taken to address the general plan issues, the Legal Division recommends that proposed regulation 18706.1 be adopted as its **first choice**. Because this regulation is drafted to govern only broad, policy-making decisions, it is appropriate that a "safe harbor" be developed for these types of decisions at Step 6. The Enforcement Division does not support this approach because it presents a risk of exempting some decisions in which (due to unique facts) it is, in actuality, reasonably foreseeable that a material financial effect will result. As currently drafted, it seems highly unlikely that this will occur where the decisions truly are merely policy-making decisions. Consequently, adoption of regulation 18706.1 is the Legal Division's first choice if the Commission does not alter the current language of the regulation with respect to the type of decisions it currently covers. Furthermore, this regulation would cover all types of economic interests (real property and business interests) and would not require significant data-collection because it is based on the type of decision considered by the official.

The Legal Division's **second choice** and the Enforcement Division's **first choice** would be amendment to regulation 18704.2 (Step 4) to specify that real property is indirectly involved. The Legal Division believes this approach is not as desirable as proposed regulation 18706.1 because, while it resolves past conflicting advice, it still essentially maintains the status quo with regard to the presumptions.

In comparison, the accompanying proposed amendment of regulation 18705.2 attempts to alter the current presumption, but, according to interested persons, it does not go far enough to be helpful for many decisions. Additionally, layering a second way of rebutting the presumption of non-materiality over the current rules will add some complexity to the analysis of real property indirectly involved in these general plan decisions. Staff does not recommend this alternative.

The **last choice** of these three approaches is adopting a new “public generally” rule. Although it seems logical to allow participation under this step due to the expected far-reaching effects of general plan decisions, a new regulation applicable to these decisions would have to include very specific factors based on the geographic characteristics of a jurisdiction (e.g., population distributions, housing densities, etc.) This approach is possible but would require much additional research to develop factors which can be applied to different-sized jurisdictions, both rural and urban. The staff does not recommend this option but supports modest amendments to existing regulation 18707.1 (see Decision 8), which would make the regulation easier to apply for all persons.

{Decision 5} Decision 5 allows the Commission to significantly narrow the regulation by making it inapplicable to land use element decisions. However, both interested persons and staff believe that omitting land use element decisions would greatly diminish the usefulness of this regulation given the importance of the land use element. **Staff²⁰ Recommendation:** Staff recommends including land use decisions which would be governed by regulation 18707.10.

{Decision 6} With regard to assessing this prong of the “public generally” exception, this decision asks whether proposed language stating that consideration *shall* be given to certain factors should be adopted. The factors would include changes to property boundaries, zoning designations, current or potential use, development or income potential, size, current or projected value of the real property and the characteristics of the neighborhood impacting the traffic, view, privacy, intensity of use, noise level and air emission as a result of the decision. **Staff Recommendation:** The Legal Division does not recommend inclusion of this language.

{Decision 7} Two options for definition of “substantially the same manner” are presented. The proposed language of Option 1 and Option 2 offers public officials more certainty that this exception applies because these options provide objective criteria for the “substantially the same manner” prong. **Staff Recommendation:** If the Commission wishes to address the general plan issues at Step 7, the Legal Division recommends Option 2. (See Discussion below.)

²⁰ References to “staff” generally refer to Legal Division, Enforcement Division and Technical Assistance Division recommendations or discussions. Where a specific recommendation references a particular division, the recommendations of different divisions may differ.

{Decision 7}, Option 1 (Proportional Basis with Optional Cap): Option 1 provides two requirements in order for the “substantially the same manner” prong to be met. First, all of the real property of the “significant segment” must be located within 500 feet of the official’s property. Second, the decision must be implemented proportionally on the basis of size. If a proportionality rule were to be adopted, staff believes there must be a cap on the financial effect experienced by the official. Nevertheless, the difficulty with imposing a cap is that it requires some kind of quantification and would not alleviate (and it may aggravate) the concerns presented by the County of San Diego regarding data-gathering.

{Decision 7a} This subdecision point attempts to cap the financial effect by comparing the size of the official’s real property with the average (i.e., the mean, mode, or median) size of real property of the “significant segment” under one alternative (bracketed language). **Staff Recommendation:** Staff does not recommend this language since, depending on the decision, it may be difficult to determine the average size of the “significant segment’s” real property.

{Decision 7a1} The other alternative uses the minimum parcel size in the official’s jurisdiction as a measure. Optional language for using the minimum parcel size of the official’s “district” is also offered. **Staff Recommendation:** If regulation 18707.10 is adopted, staff recommends including the “district” language since the official’s district can currently be used to determine the “significant segment” in the general rule. In addition, the public official should have the ability to compare his or her property to the minimum parcel size in the official’s district which may vary greatly from the minimum parcel size in the jurisdiction at large.

{Decision 7}, Option 2 (Safe Harbor): Option 2 provides objective criteria for establishing whether the decision will affect the official’s real property in substantially the same manner as it will affect the “significant segment.”

{Decision 7b/c} Subdivision (e)(1)(A) requires that a certain number of properties **{Decision 7b}** within a specified distance **{Decision 7c}** from the official’s property be under separate ownership. **Staff Recommendation for Decisions 7b -7c:** The criterion provided at proposed regulation 18707.10(e)(1)(A) is based on a provision in the repealed small jurisdiction regulation. Repealed as a result of the change in the real property materiality standard, the small jurisdiction regulation listed a number of factors the Commission had determined were useful in assessing whether the “public generally” exception should apply. Drawing on this previous determination, “100” properties should be used with regard to Decision 7b, and a “2,500” foot radius should be used with regard to Decision 7c if regulation 18707.10 is adopted.

The subdivision also provides an alternate standard for rural areas **{Decision 7d}**. In areas where the housing density is 100 housing units/sq. mile or less, at least 5,000 properties must be under separate ownership, regardless of the distance from the official’s property. Subdivision (e)(1)(D) requires that the size of the official’s real property and the minimum parcel size of the official’s jurisdiction does not vary by more

than a specified percentage. **Staff Recommendation:** If regulation 18707.10 is to be adopted, staff recommends not only that special provisions applicable to rural areas be included but also recommends further research on appropriate factors applicable to different types and sizes of jurisdictions.

{Decision 7e} As with subdivision (e)(1)(B), Decision 7e adds optional language for using the minimum parcel size of the official's "district." **{Decision 7f}** Decision 7f has bracketed language to determine the variance measured as a percentage. **Staff Recommendation on Decisions 7e – 7f:** For the same reasons as discussed in the recommendation on Decision 7a1, staff recommends including "district." In addition, staff recommends selecting "10%" for the variance if the Commission does not wish to broaden the "substantially the same manner" prong to the extent financial effects are determined by property size.

Option 2 appears to be more desirable since it aims to maintain the traditional "substantially the same" manner approach but by using easier-to-apply criteria. Nevertheless, a "one size fits all" rule for "substantially the same manner" could be too broad for an exception. At Step 7, there would be no subsequent guard against improper participation, regardless of the magnitude of the financial effect of a decision on an official.

{Decision 8} Regulation 18707.1 – Various Amendments

Various clarifying amendments are suggested in Version 1. Version 2 includes specific language to clarify the general exception as to "leaseholds." **Legal Division Recommendation:** Staff recommends Version 1 to clarify application of the "public generally" exception.

Attachments:

Steps 4 & 5 – Attachment 1

Step 6 – Attachment 2

Step 7 – Attachment 3

Clarification of Regulation 18707.1 – Attachment 4

Densities – Attachment 5

Examples – Attachment 6